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No. 81-60

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JOSEPH S. HOPPER,
WARDEN,

Petitioner,

v.

JAMES ANDREW JOHNSON,
A/K/A JERRY LEON BROOKS,

Respondent.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Howard J. Manchel
Counsel of Record

Please serve:

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QUESTIONS PRESENTED

Respondent-Appellee has considered the Petitioner's question and can find no relevance it might have to the facts in the case for which its seeks the writ. The Fifth Circuit, in light of the facts of the case, properly did not consider the holding of Cuyler v. Sullivan, 446 U.S. 335 (1980).

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OPINION BELOW

The published opinion of the Court of Appeals for the Fifth Circuit is reported as Johnson v. Hopper, 639 F.2d 236 (5th Cir. 1981). A copy of the opinion is also attached as Appendix "A" to this brief. An earlier opinion of the United States Court of Appeals for the Fifth Circuit remanding the case for an evidentiary hearing, is reported as Brooks v. Hopper, 597 F.2d 57 (5th Cir. 1979). A copy of this order is attached to the State's Petition for Certiorari, Appendix, page 1.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 12, 1981. See Johnson v. Hopper, 639 F.2d 239 (5th Cir. 1981). A timely petition for rehearing en banc was denied on April 9, 1981. (A copy of this denial is contained in the Appendix of the State's Petition). The Court of Appeals for the Fifth Circuit granted the Petitioner's motion for a stay of the issuance of the mandate pending this petition for writ of certiorari on April 21, 1981. The petition for a writ of certiorari was filed within the allowable ninety days of the judgment of the Court of Appeals for the Fifth Circuit. This Court's jurisdiction was invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Sixth Amendment, United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF FACTS

On May 24, 1975, the V. V. Vick Jewelry Store in Columbus, Georgia, was robbed by three men. On January 27, 1976, respondent-Appellee, (James Andrew Johnson a/k/a Jerry Leon Brooks), James L. Adkins and Walter H. Springer were indicted and charged with five counts of armed robbery. Their arraignment was on May 24, 1976, and nine days later were tried before a jury in the Superior Court of Muscogee County. The three men were convicted on all five counts and Respondent-Johnson was sentenced to serve five consecutive life sentences in the Georgia State Penitentiary. No appeal was taken from these convictions.

Adkins, Springer and Respondent-Johnson were represented by one court appointed attorney, William S. Cain, a practicing attorney for over 20 years, at their trial. Prior to trial, on two separate occasions, Cain moved for the appointment of separate counsel on the grounds that a conflict of interest had arisen among the defendants. The trial judge asked Cain to explain why he felt a conflict existed, but Cain refused to do so because of the attorney-client privilege. The Court denied the request for separate counsel.

During the trial, each defendant testified on his own behalf; each denied his guilt and stated he was in Atlanta on the day of the robbery. Adkins was the last defendant to testify, and on cross-examination made statements that Respondent-Johnson telephoned him on the day of the robbery stating he was in Phenix City, Alabama, (which is adjacent to Columbus, Georgia), that he (James Johnson) had robbed V. V. Vick Jewelry and the police had his car and therefore he wanted me (Adkins) to pick him up. (R-303). Thus, Adkins directly accused his co-defendant of having admitted commission of the robbery in question. Also while on the stand Adkins stated the Respondent-Johnson had lied when asked how long he had known Adkins (R-301) and that Adkins' apartment was broken into and a notebook had been taken prior to the robbery; this notebook was discovered in the getaway car allegedly owned by James A. Johnson, Respondent.

Counsel for James A. Johnson made no effort to challenge Adkins' incriminating testimony. Respondent-Johnson's counsel refused to permit him to take the witness stand in rebuttal and waived closing argument to the jury as to all defendants. Even at sentencing defendant's counsel remained silent. The conviction was not appealed.

State habeas relief was denied. Respondent-Appellee filed a §2254 petition which was twice rejected by the district court on the grounds that since Attorney Cain had no prior knowledge that Adkins intended to implicate Respondent Johnson, no actual conflict existed. The case was appealed and the Fifth Circuit in Johnson v. Hopper, 639 F.2d 236, reversed after being presented the trial transcript.

REASONS FOR DENYING THE WRIT

1. The Court below fully considered and correctly decided the issue.

This case came before the Fifth Circuit on two separate occasions. The first time Johnson a/k/a Jerry L. Brooks petitioned pro se for habeas relief alleging that his court appointed attorney labored under an impermissible conflict because he had to represent two defendants who had conflicting defenses. The district court, without the benefit of the trial transcript, had dismissed the petition finding that it was based on only vague and conclusory allegations. Johnson appealed to the Fifth Circuit and counsel was appointed to represent him. Based on his attorney's uncontradicted assertions in his supplemental brief a panel consisting of Judges Tuttle, Tjoflat and Hill reversed and remanded to the district court, concluding that Johnson's claim that his attorney was laboring under a conflict of interest had substantial merit and cited Holloway v. Arkansas 435 U.S. 475, 98 S. Ct. 1173, 55 L Ed 2d 426 (1978) as controlling. However, they felt a transcript of the original trial was necessary for a proper and complete evaluation of the claims, and directed the district court to consider the constitutional implications of the conflict of interest articulated.

District Judge Elliot again failed to see any constitutional implications in Respondent-Appellee's denial of the right to cross-examine a co-defendant who accused him of admitting the crime in question, because they shared against their will, the same court appointed attorney. Respondent-Appellee again appealed to the Fifth Circuit and a second panel consisting of Judges Henderson, Politz and Williams again reversed and remanded to the District Court. This time, however, they had the benefit of and relied on the trial transcript. The opinion speaks for itself and clearly shows the appellate court fully considered the issue.

2. Petitioner's Argument for seeking the Writ for Certiorari is without merit because the Court's prior decisions are controlling.

Petitioner attempts to establish the holding of Cuyler v. Sullivan 446 U.S. 335 as controlling in this case. In Cuyler this Court set forth the standard for establishing a Sixth Amendment violation concerning a defendant who makes no objection at trial as to his atttorney representing allegedly conflicting interests. In the case at bar it is clear that Respondent-Johnson moved pre-trial for the appointment of separate counsel and renewed his motion after the jury retired. This single fact places this case on all fours with Holloway v. Arkansas, supra. Moreover, Petitioner appears to be arguing in a vacuum when it infers that Respondent can show no actual conflict of interest which adversely affected his attorney's performance, and they mistate the law when they argue he must show prejudice. No greater conflict could exist in our adversary system than a defendant's lawyer being unable to cross-examine his client's accusor because he also represents the accusor. For this factual reason the Fifth Circuit did not apply the holding of Cuyler v. Sullivan. In Cuyler there was no blatant conflict of interest by an attorney and therefore the holdings of Cuyler as espoused by petitioner are not controlling the case at bar.

In summary, the Respondent-Johnson urges this Court to deny the writ. Johnson has already convinced the Fifth Circuit twice that he has been denied his constitutional right to counsel and confront witnesses against him. Petitioner would have this Court make further inquiries into the obvious. The transcript is not muddled. Clearly, Respondent-Appellee showed in the District Court and before the Fifth Circuit that his counsel, against his own professional judgment, was forced to actively represent conflicting interests, and for this reason, Cuyler and the test the State would apply to the defendants does not apply.

Respectfully submitted,

Howard J. Manchel

James Andrew JOHNSON, a/k/a Jerry Leon Brooks, Petitioner-Appellant,

v.

Joseph S. HOPPER, Warden, et al., Respondents-Appellees.

No. 79-3804.

United States Court of Appeals, Fifth Circuit.

March 12, 1981.

Following remand in habeas corpus proceeding, 597 F.2d 57, the United States District Court for the Middle District of Georgia, J. Robert Elliott, Chief Judge, denied petition, and petitioner appealed. The Court of Appeals, Politz, Circuit Judge, held that petitioner was deprived of effective assistance of counsel as a result of his attorney's joint representation of three defendants at state criminal trial, since testimony of petitioner's codefendant tended to exculpate the codefendant and dramatically inculpated the petitioner; counsel's inability to function in conflict-free atmosphere violated petitioner's constitutional right to assistance of counsel, and the infraction of that right could not be treated as harmless error.

Reversed and remanded.

1. Constitutional Law ⇐254(2)

In the case of conflict of interest arising out of representation of more than one criminal defendant, no state action in the form of a state official's knowledge of the wrongdoing need be shown; a deprivation of due process results when judgment reached in such trial is enforced. U.S.C.A.Const. Amends. 6, 14.

2. Criminal Law ⇐641.5

Mere fact that one lawyer represents more than one codefendant does not automatically establish a conflict of interest. U.S.C.A.Const. Amends. 6, 14.

3. Criminal Law ⇐641.5

An actual rather than speculative conflict of interest must be shown before constitutional guarantee of effective assistance of counsel is implicated; the constitutional implication occurs when defense attorney is placed in a situation inherently conducive to divided loyalties. U.S.C.A.Const. Amends. 6, 14.

4. Criminal Law ⇐641.5, 1166.11

Petitioner was deprived of effective assistance of counsel as a result of his attorney's joint representation of three defendants at state criminal trial, since testimony of petitioner's codefendant tended to exculpate the codefendant and dramatically inculpated the petitioner; counsel's inability to function in conflict-free atmosphere violated petitioner's constitutional right to assistance of counsel, and the infraction of that right could not be treated as harmless error. U.S.C.A. Const. Amends. 6, 14.

Appeal from the United States District Court for the Middle District of Georgia.

Before HENDERSON, POLITZ and WILLIAMS, Circuit Judges.

POLITZ, Circuit Judge:

We review on appeal after remand the application of James Andrew Johnson for habeas corpus relief pursuant to 28

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U.S.C. § 2254. Johnson a/k/a Jerry Leon Brooks, first petitioned *pro se* for habeas relief in 1978 alleging, *inter alia*, that his court appointed counsel, who was also appointed to represent Johnson's two co-defendants in a joint trial, was laboring under an impermissible conflict. The district court dismissed the petition finding that it was based on only vague and conclusory allegations. We reversed and remanded for an evidentiary hearing. *Brooks v. Hopper*, 597 F.2d 57 (5th Cir. 1979). On remand the district court concluded that any conflict of interest which may have existed did not violate petitioners' constitutional rights. Considering this matter controlled by the opinion of the Supreme Court in *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), we reverse, order issuance of the writ of habeas corpus and remand to the district court for entry of an appropriate judgment.

Johnson, James Lewis Adkins and Walter H. Springer were indicted on five counts of armed robbery. The court appointed one attorney, William S. Cain, to represent all three defendants in a joint trial before the Georgia state court. Cain moved pre-trial for the appointment of separate counsel, expressing a concern that he could not properly represent any defendant because of the obligation to represent all three. The court asked Cain to explicate his reasons for believing a conflict existed. Cain declined on the grounds that to do so would constitute a violation of the attorney-client relationship. The court denied the request.

The joint indictment was based on charges that the three defendants had robbed the V. V. Vick Jewelry Store in Columbus, Georgia. All three testified, denied involvement and claimed to be in Atlanta on the day of the robbery. Johnson and Springer, who testified before Adkins, said they had never been to Vick's Jewelers and did not know each other at the time of the robbery. Adkins, testifying last, made several statements on cross-examination which tended to exculpate him and dramatically inculpated Johnson. Specifically, Adkins testified that on the day of the robbery Johnson telephoned him from Phenix City, Alabama (sister city to Columbus, Georgia) and said that "he [Johnson] had robbed V. V. Vick Jewelry and the police got the [getaway] car and he needed some help and wanted me [Adkins] to come pick him up." Prior to hearing it from the stand, Cain did not know that Adkins would directly accuse Johnson in this manner.

At this point Cain's vague concerns of being confronted with a situation in which representation of one client would occasion compromise of the position of another came to explosive fruition. The conflict was so severe it should have been obvious to everyone. In support of Johnson's earlier denial of involvement one would expect Johnson's counsel to endeavor to impeach or at least challenge Adkins' credibility. As Adkins' counsel, Cain was not free to do anything which might prejudice Adkins' defense. Any comment upon Adkins' testimony, either to bolster or lessen its effect, would cause Cain to breach his obligation to one client or the other. As a consequence, Cain did not examine Adkins on re-direct or recall Johnson to rebut. In fact he offered no evidence on the subject.

After the jury retired, Cain renewed his motion for the appointment of separate counsel. In his argument on the motion Cain informed the court that the pre-trial motion for separate counsel had not been based on knowledge that Adkins would testify as he did but on certain

other concerns which did not materialize. The motion was again denied. The three defendants were convicted on all five counts and sentenced to five consecutive life sentences. There was no direct appeal. State habeas relief was denied.

In denying the § 2254 application the district judge reasoned that since Cain had no prior knowledge that Adkins intended to implicate Brooks, no actual conflict existed. This fails to give proper consideration to the professionally impossible position in which Cain was placed from the moment Adkins testified about Johnson's involvement in the crime. Additionally, the district judge construed testimony by Adkins and Johnson at the state habeas proceeding to mean that Adkins did not intend to implicate Johnson in his surprise trial testimony. Our review of the record compels a contrary conclusion. Regardless, we question the relevance of Adkins' intentions.

As we stated at the outset, this case is controlled by the Supreme Court's disposition in *Holloway v. Arkansas*, *supra*. In *Holloway* one attorney was appointed to represent three defendants. He requested, before trial, that separate counsel be appointed, raising the spectre of conflict if one attorney tried to represent all three. When he learned that all defendants might testify, the attorney in *Holloway* resubmitted his motion on the ground that he would not be able to properly examine his clients for fear he might intrude upon the attorney-client privilege. The motion was again denied and the defendants were ultimately found guilty. The Supreme Court reversed their convictions, holding that the failure of the trial court to appoint separate counsel deprived the defendants of their Sixth Amendment guarantee of the effective assistance of counsel.

[1] In the case *sub judice* the district court placed too great an emphasis on Cain's inability to make an accurate pretrial prediction of the exact problems that would arise. Cain's pre-trial motion, merely stating that separate counsel would be necessary to avoid a conflict, is quite similar to the motion in *Holloway* which was found to be sufficient to apprise the trial court of potential conflict. We have applied the rationale of *Holloway* in a situation where *no* request for separate counsel was made, concluding that ineffective representation by a lawyer laboring under a conflict of interest renders the trial fundamentally unfair whether the judge knew of the conflict or not. *Stephens v. United States*, 595 F.2d 1066 (5th Cir. 1979). Unlike most Fourteenth Amendment due process cases, no state action in the form of a state official's knowledge of the wrongdoing need be shown. A deprivation of due process results when the judgment reached in such a trial is enforced. *Zuck v. State of Alabama*, 588 F.2d 436 (5th Cir. 1979).

[2-4] The mere fact that one lawyer represents more than one co-defendant does not automatically establish a conflict of interest. *Holloway*, 435 U.S. at 482, 98 S.Ct. at 1177; *United States v. Risi*, 603 F.2d 1193 (5th Cir. 1979). Further, an actual rather than a speculative conflict of interest must be shown before the constitutional guarantee of effective assistance of counsel is implicated. *Zuck*, *supra*, 588 F.2d at 439; *United States v. Alvarez*, 580 F.2d 1251 (5th Cir. 1973). The constitutional implication occurs when a defense attorney is placed in a situation "inherently conducive to divided loyalties." *Castillo v. Estelle*, 504 F.2d 1243, 1245 (5th Cir. 1974). We believe that Cain was clearly placed in such a situation. Cain was put in an untenable professional position when the court ap-

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pointed him to represent all three defendants despite the apparent potential for conflict. The court should have extricated him from this position upon his initial request. The representations of an attorney, as an officer of the court, that he perceives a potential conflict should be given very serious consideration. *Holloway*, 435 U.S. at 486, 98 S.Ct. at 1179. The state district judge's failure to grant that first motion, pre-*Holloway*, is understandable. The denial of the renewed motion, after Adkins' surprise testimony inculpating Johnson, is not so easily understood. An injustice was done to Cain and the constitutional right to effective assistance of counsel was denied Johnson.

We need not inquire into the specific prejudice suffered by Johnson as a result of his lawyer's unavoidable divided loyalties, nor should we speculate on whether he would have been convicted regardless. Cain's inability to function in a conflict-free atmosphere violated Johnson's constitutional right to the assistance of counsel, a right so basic to a fair trial that its infraction cannot be treated as harmless error. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The fact that Cain was present during the entire trial proceeding is of no moment. "The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters." *Holloway, supra*, 435 U.S. at 490, 98 S.Ct. at 1181. For this reason, the Court held in *Holloway* that when an actual conflict exists prejudice need not be proven, reversal is automatic. As the Supreme Court said in the landmark case, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942):

> To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. Cf. *Snyder v. Massachusetts*, 291 U.S. 97, 116 [54 S.Ct. 330, 336, 78 L.Ed. 674]; *Tumey v. Ohio*, 273 U.S. 510, 535 [47 S.Ct. 437, 445, 71 L.Ed. 749]; *Patton v. United States*, 281 U.S. 276, 292 [50 S.Ct. 253, 256, 74 L.Ed. 854]. And see *McCandless v. United States*, 298 U.S. 342, 347 [56 S.Ct. 764, 766, 80 L.Ed. 1205].

315 U.S. at 75–76, 62 S.Ct. at 467.

The reason behind the dispensation of the requirement of proving prejudice should become apparent when one considers the nigh impossible task of making a meaningful qualitative analysis of trial counsel proficiency, in a case involving divided loyalties, from an examination of the transcript alone. In *Risi v. State of Alabama*, 588 F.2d 436 (5th Cir. 1979), we decried the inadequacy of a trial transcript when one seeks to assess a lawyer's trial performance for subtle variations in demeanor and lack of vigor and depth of cross-examination cannot be truly reflected in the pages of a transcript.

In a case when the attorney is confronted with a conflict of interest between co-defendants prejudice must be presumed and, except under the most extraordinary circumstances, the error cannot be considered harmless.

We conclude that Cain's conflict of interest operated to make Johnson's trial fundamentally unfair and constitutionally infirm. The decision of the district court denying habeas corpus relief is reversed; habeas relief is to be appropriately granted. The matter is remanded for entry of a proper judgment.

REVERSED and REMANDED.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-60

JOSEPH S. HOPPER,
Warden,
Petitioner

vs.

JAMES ANDREW JOHNSON
a/k/a JERRY LEON BROOKS,
Respondent

Motion For Leave To Proceed

In Forma Pauperis

The respondent, JAMES ANDREW JOHNSON, a/k/a JERRY LEON BROOKS, who is now held at the Central Correctional Institute in Macon, Georgia, a facility of the Georgia Department of Corrections, asks leave to file his "Brief In Opposition To The Writ of Certiorari" without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. The undersigned counsel has been appointed to represent respondent in the Middle District of Georgia pursuant to the Criminal Justice Act (18 USC §3006 (d)(6)) as shown by the attached exhibits.

Howard Jay Manchel
Counsel for James A. Johnson

Suite 3311, 101 Marietta Tower
Atlanta, Georgia 30303
404-522-1701

Certificate of Service

I, Howard J. Manchel, Attorney for Respondent, hereby certify that I have served a copy of the foregoing Motion upon Susan Boleyn, 132 State Judicial Building, 40 Capitol Square, Atlanta, Georgia, by depositing same in the U.S. mail with sufficient first class postage.

Howard J. Manchel

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA

COLUMBUS DIVISION

JERRY LEON BROOKS, a/k/a ANDREW JOHNSON,	:	
Petitioner,	:	CIVIL ACTION
-vs-	:	FILE NO. 78-1-Col.
JOE S. HOPPER, Warden,	:	
Defendant.	:	

ORDER APPOINTING COUNSEL

This Court being satisfied that the Defendant, above-named, is financially unable to employ counsel;

It is hereby ORDERED that Howard J. Manchel, is appointed to represent the Defendant in the above-designated case unless relieved by an Order of this Court or by Order of the Court of Appeals.

And it is so ORDERED this the 17 day of September, 1979.

J. Robert Elliott

J. ROBERT ELLIOTT
UNITED STATES DISTRICT COURT JUDGE

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UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF GEORGIA

COLUMBUS DIVISION

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JERRY LEON BROOKS, a/k/a JAMES A. JOHNSON,	:	
Petitioner,	:	CIVIL ACTION
	:	NO. 78-1-61
vs.	:	
	:	NOTICE OF APPEAL
JOSEPH S. HOPPER, WARDEN GEORGIA STATE PRISON,	:	
Respondent.	:	

Notice is hereby given that JERRY LEON BROOKS, a/k/a James A. Johnson, petitioner above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 2nd day of November, 1979.

This 6 day of November, 1979.

Howard J. Manchel
HOWARD J. MANCHEL
Attorney for Jerry L. Brooks

101 Marietta Tower
Suite 3311
Atlanta, Georgia 30303

ORDER

Defendant's request to proceed upon appeal in forma pauperis in hereby granted.

/s/ J. Robert Elliott
UNITED STATES DISTRICT JUDGE